Office-Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-923

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

ALBERT KORNBERG and LAURA KORNBERG,
His Wife,
Respondents.

BRIEF OF RESPONDENTS ALBERT KORNBERG AND LAURA KORNBERG, HIS WIFE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals correct in its holding that all class members had complied with contractual notice provisions where the class action was commenced within the 185 days prescribed by the provision in the contract of passage?

2. Was the Court of Appeals correct in its holding that the District Court for the Southern District of Florida was under the circumstances of this case in error in decertifying the class action?

3. Was the Court of Appeals correct in its holdings that the shipowner could not disclaim its liability for negligence and that its disclaimer of the implied warranty of seaworthiness was misplaced since the passengers' claims are not predicated upon unseaworthiness?

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Respondents Albert Kornberg and Laura Kornberg, his wife, respectfully request that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Opinion of the Court of Appeals, which reversed the Order of the District Court granting Summary Judgment to Carnival and which vacated the Order of the District Court Decertifying the Class Action and Denying Class Action and remanded the case to the District Court is reported at 741 F. 2d 1332 (11th Cir. 1984) and the Opinion thereof is reproduced in the Appendix to the Petition for Writ of Certiorari ("Appendix").

The Opinion of the District Court granting Carnival's Motion to Decertify the Class is reported at 1983 A.M.C. 2338 (S.D. Fla. 1983).

The Opinion of the District Court granting Summary Judgment in favor of Carnival is not reported.

Both Opinions are reproduced in the Appendix.

COUNTER-STATEMENT OF THE CASE

Plaintiffs Albert Kornberg and Laura Kornberg, his wife, were two of approximately 1,040 passengers who sailed aboard the SS Tropicale from Dodge Island, Florida on January 30, 1982 for a seven day cruise. The TSS Tropicale was a new passenger ship which had been delivered to the defendant in December of 1981. The vessel had sailed on two cruises before the cruise in question and on the previous two cruises there had been serious problems with the sanitary system aboard the vessel, a new type of system called an Evak system. The record is clear that the deplorable and inoperable condition of the toilets aboard the vessel was widespread and affected all of the passengers aboard the vessel for the cruise. The vessel's official records confirm the fact that these conditions had existed on the prior two voyages and that the defendant knew or should have known about these conditions. Under the circumstances defendant had an obligation to warn the prospective passengers so that they could make intelligent decisions as

to whether or not they wanted to sail aboard the vessel under these circumstances.

Since the class action was commenced by the Kornbergs within the 185 day notice provision set forth in the contract of passage, the numerosity requirement under the class action statute was certainly satisfied. The Court of Appeals also found properly that the typicality requirements under the Class Action Statute were also satisfied.

REASONS FOR DENYING THE WRIT

I. The Court Below Properly Interpreted and Followed the Decision of This Court in the American Pipe Case.

In the instant case the contract of passage contained a provision that notice of claim must be filed within 185 days. The class action in this case was commenced 24 days after the cruise ended on February 6, 1982. The Court below properly followed the holding of this Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974).

II. The Court Below Properly Found that the Plaintiffs Clearly Presented Claims Typical of the Class and, Therefore, Its Judgment Vacating the District Court's Order Decertifying the Class and Denying Class Action and Remanding was Proper.

The Court of Appeals for the 11th Circuit stated at the outset of the portion of its Opinion discussing the class action and the "numerosity" and "typicality" requirements of Fed. R. Civ. P. 23 (a)(1) and (2) that "That decision must be upheld unless it constituted an abuse of discretion. *Zeidman v. J. Ray McDermott & Co.*, 651 F. 2d 1030, 1038-39 (5th Cir. 1981)."

The Court then determined that the "numerosity" test was met and that the District Court failed to follow

the *American Pipe* case. The Court then discussed "typicality" and the standard to be used in determining "typicality" and stated: "Judged by this standard, plaintiffs clearly present claims typical of the class."

Since it is clear that the Court of Appeals was aware of the proper standard to be used and since the Court obviously determined that the District Court had abused its discretion, the decision of the Court of Appeals should not be disturbed.

III. The Court Below Properly Concluded that None of the Three Disclaimers Which the Petitioner Raised as Defenses to the Claim Applied in the Instant Case and that the District Court Erred in Granting Summary Judgment.

The Court of Appeals properly held pursuant to 46 U.S.C. Sec. 183 c that any attempt by the shipowner to disclaim liability for negligence is unlawful. The Court of Appeals properly found that the disclaimer of liability for any warranty of seaworthiness was irrelevant because the plaintiffs were not making any claim for breach of seaworthiness but were basing their claim on the shipowner's *failure to warn* which involves negligent conduct and which conduct under 46 U.S.C. Sec. 183 c cannot be avoided by contract. It is submitted that the Court of Appeals properly held that the disclaimers under the circumstances of this case would be void as against public policy and that the Court of Appeals properly followed the decision of this Court in *Liverpool and Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U.S. 397, 9 S. Ct. 469, 32 L. Ed. 788 (1899).

As the Court of Appeals stated in its opinion (Appendix, p. 7): "It should be beyond debate that provision of an adequate sanitary system on a passenger boat is an 'essential function' for which a sea carrier cannot disclaim responsibility."

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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